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Transparency and Access to Government Information in the Netherlands

*Kars J. de Graaf, Albert T. Marseille,
and Hanna D. Tolsma*

I INTRODUCTION

Some years ago, the Netherlands was regarded as a leading country in terms of transparency and access to government information. The Government Information (Public Access) Act (WOB, *Wet openbaarheid van bestuur*) came into force in 1980. Since then, many countries have introduced freedom-of-information legislation, and there are doubts as to whether practice and legislation in the Netherlands still meet present-day requirements with regard to transparency and access to information. The Netherlands has fallen behind in comparison with other countries that have recently introduced a Freedom of Information Act.¹

This chapter starts with a summary of information legislation in the Netherlands (Sect. 2) and provides information about the number of applications for the disclosure of documents (Sect. 3). Access to information

¹ *Kamerstukken II* (Parliamentary Papers) 2011–2012, 33,328, No. 3, pp. 2–3.

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will then be discussed in detail, in the context of the Government Information (Public Access) Act (hereinafter WOB), which stipulates that the government is obliged to provide information both on the basis of an application and voluntarily (Sect. 4). After this we focus on legal remedies (Sect. 5) and on future developments (Sect. 6). This chapter concludes with some final remarks (Sect. 7).

2 ACCESS TO INFORMATION IN THE NETHERLANDS: AN OVERVIEW OF THE LEGISLATION

In order to ensure ‘good democratic governance’, the Netherlands has had a Government Information (Public Access) Act since 1980.² This legislation is based on Article 110 of the Dutch Constitution: ‘In the exercise of their duties, government bodies shall observe the right of public access to information in accordance with rules to be prescribed by Act of Parliament’. The WOB is based on the principle of disclosure, with regard to providing information on request as well as voluntarily. In particular, systematic and technical legal amendments to the original act resulted in the current WOB, which came into effect on 1 May 1992.³ It has been amended several times since then, in order to comply with (new) European and international requirements. In 2005, for example, specific provisions about environmental information were incorporated in the WOB by means of the act implementing the Directives on the first and second ‘pillars’ of the Aarhus Convention.⁴ Provisions regarding the re-use of government information have also been incorporated in the WOB by the act implementing the Directive on the Re-use of Public Sector Information.⁵

In addition to the WOB, the Netherlands has legislation on public access and disclosure/non-disclosure in many fields. The Youth Act (*Jeugdwet*), for example, contains provisions about the confidentiality and disclosure of documents concerning young persons. The Financial Supervision Act (WFT, *Wet op het financieel toezicht*) contains regulations on confidential data/information supplied or obtained pursuant to the WFT. The relationship between the WOB and other specific legislation and regulations is set out in Article 2 (1) of the WOB:

² Act of 9 November 1978, Bulletin of Acts and Decrees 1978, 581.

³ Act of 31 October 1991, Bulletin of Acts and Decrees 703.

⁴ Act of 23 June 2005, Bulletin of Acts and Decrees 2005, 341.

⁵ Act of 22 December 2005, Bulletin of Acts and Decrees 2006, 25.

An administrative authority shall, in the exercise of its functions, disclose information in accordance with the present Act, without prejudice to provisions laid down in other statutes.

It follows from this provision that the WOB is a general piece of legislation over which specific disclosure regulations formally laid down in legislation take precedence. It is established case law of the Administrative Jurisdiction Division of the Council of State (hereinafter ABRvS, *Afdeling bestuursrechtspraak van de Raad van State*) that specific disclosure regulations of a comprehensive nature that are formally laid down in legislation take precedence over the WOB.⁶ Regulations are deemed to be comprehensive when they are designed to prevent the application of the WOB from detracting from the proper functioning of material provisions in the special legislation.

The Open Government Act (WOO, *Wet open overheid*) was adopted by the House of Representatives on 19 April 2016.⁷ The bill is currently before the Senate and will, if adopted by the Senate, replace the WOB.⁸ According to the explanatory memorandum, the aim of this legislation is to make public and parastatal bodies more transparent in order to better serve the openness of public information for the democratic state, citizens, governance and economic development.⁹ According to the initiators, new legislation is needed because the current WOB no longer aligns with current thinking on the value of and need for openness. In practice in the Netherlands, too little information is disclosed voluntarily under the current WOB. In addition, the grounds for exemption exclude too much information from public scrutiny, and people requesting information may be faced with high costs.¹⁰ The new legislation is not undisputed. The Association of Netherlands Municipalities (VNG, *Vereniging van Nederlandse Gemeenten*) supports the principles of the legislation, but there are major concerns about its practicability, the cost and the pressure it will exert on the democratic decision-making process. According to a study commissioned by the Minister of Foreign Affairs and Kingdom Relations (the report ‘Quick scan impact Wet open overheid’ on the consequences of the WOO for the civil service), the new legislation is not

⁶ ABRvS 30 June 2010, ECLI:NL:RVS:2010:BM9675.

⁷ *Kamerstukken I* 2015–2016, 33,328, A (amended bill).

⁸ See Sect. 6.

⁹ *Kamerstukken II* 2013–2014, 33,328, No. 9, p. 5.

¹⁰ *Kamerstukken II* 2013–2014, 33,328, No. 9, p. 2.

practicable and will lead to high extra costs that are not covered in the multi-year budget.¹¹ The Senate will consider these findings in its discussions on the legislation.

3 NUMBER OF APPLICATIONS FOR THE DISCLOSURE OF DOCUMENTS

How often do administrative authorities receive applications for the disclosure of government information? This is not an easy question to answer. Information about the number of applications for information is not recorded on a systematic basis.

A study carried out in 2010 contains a summary of the processing of applications for information that were received by 334 administrative authorities.¹² The study shows that the vast majority of applications for information are submitted to the police. In 2010 there were more than 17,000 applications. The combined total of applications received by all other authorities in that year was 8,000. More recent data, from 2013, are consistent with those of the 2010 survey.¹³

Figure 5.1 clearly shows the difference between the police and other public authorities. Most applications to the police concern information about determining speed violations with automated roadside speed camera

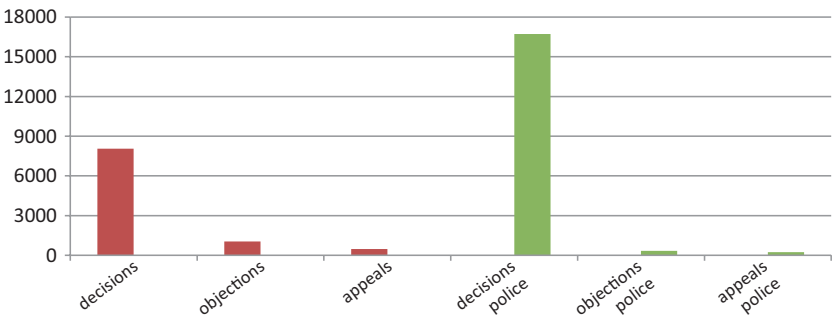


Fig. 5.1 Applications for information: numbers of decisions, objections and appeals

¹¹ *Kamerstukken II* 2016–2017, 33,328, No. 37.

¹² Van Haefen et al. (2010).

¹³ Boonstra (2013).

systems. Figure 5.1 also incorporates figures on objections and appeals against decisions on applications for information. Here, too, the difference is considerable. The number of objections lodged against decisions on applications for information is relatively higher in the case of authorities other than the police. In general, government disclosure decisions lead to an objection procedure in 13% of cases. An estimated 30% of government decisions on objections are challenged in the administrative courts.¹⁴ Far fewer objections are lodged with the police. Only 2% of decisions on applications for information result in an objection procedure. Decisions on objections are challenged no less often in the case of other government bodies. The police dealt with 334 objection procedures, and 251 police decisions resulted in appeals and further appeals.

How many applications for information do administrative authorities receive each year? If we exclude the police, the average number of applications made per year is 14 per administrative authority. The frequency varies considerably from authority to authority.

A number of differences evident in Fig. 5.2 are not surprising. Obviously, the number of applications varies depending on the size of municipality. However, the number of applications received in proportion to the number of inhabitants is lower in large municipalities than in small municipalities: municipalities with a population of up to 20,000 receive 10 applications per municipality per year on average. Municipalities with a population of between 20,000 and 50,000 receive 12 per year, municipalities with a population of between 50,000 and 100,000 receive 18 per year, and municipalities with a population of more than 100,000 receive 32 per year. Notably, a relatively high number of applications are received by ministries, but the number received by non-departmental public bodies is very low.

The 2010 study is merely a snapshot and does not show whether the number of applications from year to year is stable, rising or falling. Internal numbers about applications for information at central government ministries in 2016, provided by the central government to the authors, don't indicate major changes. In 2010 survey reported that ministries received 1,187 requests in 2010. In 2016 they received 1,191 requests.

¹⁴Precise numbers are not available. It is known only that there were 1,049 objection procedures and 483 appeals.

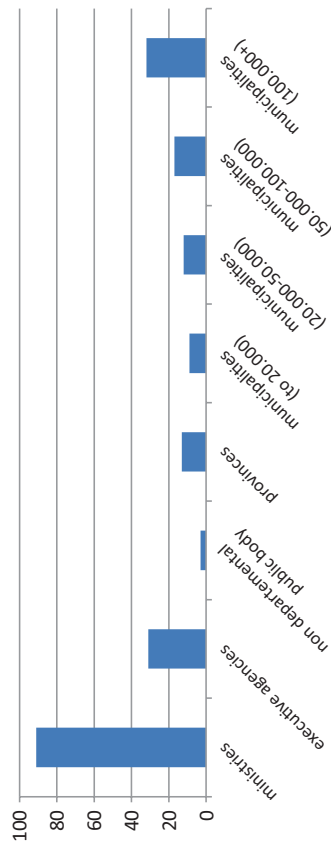


Fig. 5.2 Average number of applications submitted to different categories of administrative authorities

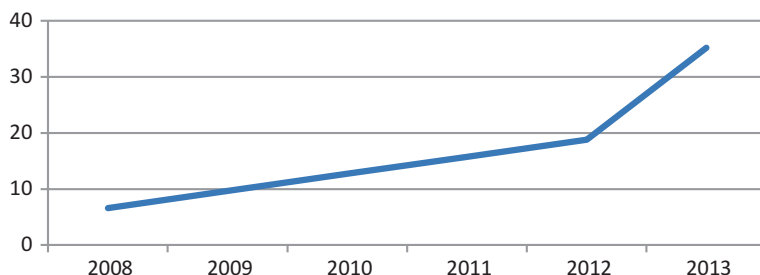


Fig. 5.3 Average number of applications per year per municipal authority

A study carried out in 2014 compared three years (2008, 2012 and 2013), based on a survey among municipal authorities.¹⁵ Data were gathered from 224 municipal authorities. In the survey, municipal officials responsible for dealing with information requests were asked how many requests were received in 2008, 2012 and 2013 (Fig. 5.3).

The figure shows a clear increase.¹⁶ In 2008, an average of 6.6 requests were submitted per year. In 2012, this figure had almost trebled to 18.8 applications per year. In 2013 there was a further increase, to 35.2 applications per year.

Anyone searching for further systematic information on the numbers of information requests has to rely on the data provided by individual administrative authorities, which is scarce. If administrative authorities publish such information on their websites, in many cases this is merely a selection of documents disclosed in response to an application for information.

On the basis of the information available, we may conclude that the number of applications for information varies widely from authority to authority. The police and central government authorities receive particularly large numbers of applications. A further notable trend is the increase in the number of applications in the past decade, which is particularly visible in the case of municipal authorities.

¹⁵ <http://docplayer.nl/11253612-Afrekenen-met-de-wob-onderzoek-naar-oneigenlijk-gebruik-van-de-wet-openbaarheid-van-bestuur-bij-gemeenten-en-politie.html>.

¹⁶ The numbers for 2008 are based on 140 observations, those for 2012 on 189 observations and those for 2013 on 206 observations. The survey did not ask for the precise number of applications, but whether, in each of the three years, the number was between 0 and 3, 4 and 10, 11 and 20, 21 and 30, 31 and 40, 41 and 50, or 50+. In order to estimate the average number, we have assumed that the averages for the different categories are 1, 7, 15, 25, 35, 45 and 60 requests.

4 ACCESS TO INFORMATION PURSUANT TO THE WOB

4.1 *Introduction*

The WOB stipulates that information must be provided on request. Article 3 of the WOB stipulates that anyone may apply to an administrative authority or to an agency, service or company carrying out work under the responsibility of an administrative authority for information contained in documents concerning an administrative matter. This section will first discuss the relevant terms that determine the scope of the WOB, such as ‘administrative body’, ‘document’, ‘administrative matter’ and ‘anyone’ (Sect. 4.1). The formal aspects of an application for access to information will then be discussed, including the formalities surrounding the application, decision period and cost (Sect. 4.2). In addition to stipulating that information must be provided on request, the WOB also stipulates that administrative authorities must provide information voluntarily (Sect. 4.3).

4.2 *Information on Application*

It follows from Article 3 of the WOB that applications for information may be submitted to an *administrative authority*. In the WOB, the term ‘administrative authority’ has the same definition as in Article 1:1 (1) of the General Administrative Law Act (GALA, *Algemene wet bestuursrecht*). The starting point is that all administrative authorities fall within the scope of the WOB, unless excluded by an Order in Council (AMvB, *Algemene Maatregel van Bestuur*). Article 1a of the WOB specifies the administrative authorities to which the act applies, namely: ministers; the administrative authorities of provinces, municipalities, water boards and regulatory industrial organisations; and administrative authorities carrying out activities under the responsibility of these authorities and such other administrative authorities are not excluded by Order in Council. The relevant Order in Council (the Administrative Authorities (WNO and WOB) Decree) excludes only a few administrative authorities and only for certain duties, for example, the Dutch Broadcasting Foundation (NOS, *Nederlandse Omroep Stichting*). In the case of administrative authorities in the latter category that are excluded through Order in Council, Article 1a (2) of the WOB states that the legislation does apply to the provision of environmental information.

Article 1:1 of the GALA defines two categories of administrative authorities. The first are administrative authorities of legal entities that have been established by public law (e.g. the mayor, aldermen and council that are part of a municipal authority). The GALA applies to all aspects of the functioning of this category of administrative authorities. Secondly, other persons and boards are also designated as administrative authorities if they are vested with public authority to any extent. Examples include bodies of a legal entity established by private law (foundation) that are not government authorities but do have powers pertaining to public law. Bodies in this category are only designated as an administrative authority insofar as public authority is vested in them. Finally, Article 1:1 (2) of the GALA summarises the authorities, persons and bodies that are not deemed to be an administrative authority. These include the legislature, the upper and lower houses and the joint session of Parliament, authorities charged with the administration of justice and the National Ombudsman. Although the monarch is not named, it follows from the jurisprudence of the ABRvS that he/she is not designated as an administrative authority either.¹⁷ Pursuant to Article 1:1 (3) of the GALA, an authority, person or body corporate excluded under the provisions of subsection 2 is nonetheless deemed to be an administrative authority insofar as it makes orders or performs acts in relation to a public servant within the meaning of the Central and Local Government Personnel Act (*Ambtenarenwet*).

Under Article 3 (1) of the WOB, the scope of the legislation is extended to agencies, services or companies carrying out work under the responsibility of an administrative authority. One example of such a company is a municipal public-transport company. Finally, it should be noted that the scope of the Dutch term *bestuursorgaan* (administrative authority) is more limited than the scope of the term ‘public authority’ as defined in the Tromsø Convention, which applies to judicial and legislative bodies insofar as their tasks involve the performance of administrative duties. The Netherlands is currently not a signatory to the Convention.¹⁸ If the Netherlands ever becomes a signatory, this will have consequences for the current restriction of the WOB’s scope to ‘administrative authorities’.¹⁹

Applications for access to information submitted under Article 3 of the WOB must relate to information contained in *documents*. In Article 1 (a)

¹⁷ ABRvS 6 June 2007, ECLI:NL:RVS:2007:BA6497.

¹⁸ *Kamerstukken II* 2010–2011, 32,802, No. 1, pp. 3–4.

¹⁹ Daalder (2015), p. 141.

of the WOB, ‘document’ is defined as ‘a written document or other material containing data that is held by an administrative authority’. Examples mentioned in the explanatory memorandum of material containing data include photos, films and material in digital form.²⁰ It is evident from the above that the term ‘document’ is very broadly defined. This broad definition is also reflected in case law. For example, video images, emails and electronically recorded information on a hard drive fall within the scope of the term document.²¹ Websites not managed by the administrative authority consulted by officials are not considered documents.²²

The term ‘document’ delineates the scope of the WOB. Applications for information that consist only of informative questions are not regarded as ‘WOB requests’.²³ Applications must relate to documents held by an administrative authority. The WOB does not require administrative authorities to gather information. In the case of applications relating to documents held by another administrative authority, Article 4 of the WOB stipulates that the applicant must be referred to that authority if necessary. Administrative authorities are not obliged to trace requested documents that are held by another authority.²⁴ In case of applications concerning information that is not contained in a document, it follows from the WOB that the administrative authority is not required to create a document with the information requested. This is not altered by the fact that the information may be easy to compile from existing (digital) sources.²⁵

It follows from legal precedent that if an administrative authority discovers after investigation that it does not hold a certain document, and such a statement does not come across as unreasonable, in principle it is the responsibility of the person making the request to demonstrate that the document *is* held by the administrative authority.²⁶ In the case of documents that are not held by the administrative authority but that should be held by it (e.g. pursuant to the Public Records Act, *Archiefwet*), the administrative authority is expected to take all reasonable steps to obtain the documents.

²⁰ *Kamerstukken II* 1986–1987, 19,859, No. 3, p. 21.

²¹ ABRvS 19 December 2012, ECLI:NL:RVS:2012:BY6779, ABRvS 12 August 2009, ECLI:NL:RVS:2009:BJ5104 and ECLI:NL:RVS:2006:AV5076.

²² ABRvS 16 August 2006, ECLI:NL:RVS:2006:AY6317.

²³ ABRvS 7 August 2013, ECLI:NL:RVS:2013:642.

²⁴ ABRvS 9 April 2014, ECLI:NL:RVS:2014:1205.

²⁵ ABRvS 5 June 2013, ECLI:NL:RVS:2013:1205.

²⁶ ABRvS 20 October 2010, ECLI:NL:RVS:2010:1205.

In accordance with Article 3 of the WOB, a request for information must relate to an *administrative matter*. In Article 1 (b) of the WOB, an ‘administrative matter’ is defined as ‘a matter of relevance to the policies of an administrative authority, including the preparation and implementation of such policies’. According to the legislative history²⁷ and precedents, the term ‘administrative matter’ must be interpreted broadly: it relates to public administration in all its facets. The agendas and minutes of meetings and the annual reports of Works Councils relating to the internal organisation of municipalities must be designated as documents on administrative matters within the meaning of the WOB.²⁸ Information relating to the recording of decisions/decrees and other documents, and the outgoing and incoming mail records, are also regarded as administrative matters,²⁹ as are mediation reports on the implementation of urgency policy.³⁰ There are relatively few examples of legal precedent regarding applications for information that do not relate to an administrative matter. According to the ABRvS, administrative matters do not include insurance policies held by third parties for various premises or leases between the owners and tenants of the premises.³¹

Article 3 of the WOB stipulates that *anyone* may apply to an administrative authority for information contained in documents concerning an administrative matter. The legislative history shows that the applicant’s interest is not relevant in the processing of applications for information.³² In 2004, this was specified in the implementation of the Aarhus Convention in Article 3 (3) of the WOB, which stipulates that the applicant does not need to state an interest.

4.3 *Formal Aspects Relating to Applications for Access to Information*

The WOB contains hardly any requirements regarding how to submit WOB requests. It follows from Article 3 (2) of the WOB that the applicant must specify the administrative matter, or the document relevant to it,

²⁷ *Kamerstukken II* 1986–1987, 19,859, No. 3, p. 25.

²⁸ For example, ABRvS 8 July 2015, ECLI:NL:RVS:2015:2118; ABRvS 21 January 2009, ECLI:NL:RVS:2009:BH0453.

²⁹ ABRvS 5 December 2012, ECLI:NL:RVS:2012:BY5117.

³⁰ ABRvS 21 August 2013, ECLI:NL:RVS:2013:796.

³¹ ABRvS 30 November 2011, ECLI:NL:RVS:2011:BU6348.

³² *Kamerstukken II* 1986–1987, 19,859, No. 9, p. 13–14.

about which he wishes access. The starting point is that there is no specified format for WOB requests. The WOB contains no formal requirements as to how WOB requests for information must be submitted. Applications may be made verbally or in writing.³³ Administrative authorities may specify forms for submitting applications for information. The use of standard forms may prevent uncertainty as to the status of applications and can prevent ‘concealed requests’ that constitute misuse of the WOB. However, it follows from legal precedent that administrative authorities must not oblige applicants to use such forms.³⁴ According to the ABRvS, Article 4:4 of the GALA, on specifying the use of forms, does not apply to WOB requests. Therefore, an administrative authority may not refuse to deal with WOB applications (Article 4:5 of the GALA) if the applicant has not used the specified form.

Article 5 of the WOB states that decisions on applications may be given verbally or in writing. In certain situations, however, the administrative authority is required to issue a decision in writing. A decision in writing is required in the event of a refusal to disclose all or part of the information requested in writing. A decision in writing is also required if the applicant requests this when applying for information verbally and also if the application for information relates to a third party that has requested a written decision. A written decision issued by an administrative body in response to a WOB request is a decision within the meaning of Article 1:3 of the GALA. This means that decision-making norms in the GALA also apply to the processing of WOB requests, such as the requirement to gather information (Article 3:2 of the GALA), the requirement to substantiate the request (Article 3:46 of the GALA) and the requirement to hear the views of interested parties (Article 4:8 of the GALA). This requirement to hear views is relevant if the information requested relates to a third party.

In accordance with Article 6 (1) of the WOB, administrative authorities must decide on the application for information as soon as possible and in any case no later than four weeks after the date of receipt of the application. Under Article 6 (2) of the GALA, the administrative authority may postpone the decision for up to four weeks and must communicate this in writing to the applicant, stating reasons, before the end of the first period. If an interested (third) party is to be given the opportunity to make its views known (Article 4:8 of the GALA), the decision will be deferred until

³³ *Kamerstukken II* 1987/88, 19,859, No. 6, p. 24.

³⁴ ABRvS 17 August 2016, ECLI:NL:RVS:2016:2273.

the date on which the party makes its views known or until the period allowed for this has elapsed. If the administrative authority decides to supply the information, it will do so when the decision is issued. The only exception to this is cases where interested parties are expected to object. In such cases, the information is not supplied until at least two weeks after the decision has been issued (Article 6 (5) of the WOB). The period of two weeks gives the third party the opportunity to prevent the disclosure of the information by requesting a temporary injunction.³⁵ In accordance with European Directives, a different decision period applies to requests for environmental information. It follows from Article 6 (6) that the maximum decision period is two weeks, with the possibility of postponement if the amount or complexity of the environmental information justifies this.

If the administrative authority decides to disclose the requested information, it must then decide on the form in which the information will be supplied. Article 7 of the WOB contains several options: issuing a copy, granting access to the contents of the documents, supplying an extract from the documents or a summary of their contents or supplying information contained in the documents. The principle is that the administrative authority supplies the information in the form required by the applicant. This does not apply if the administrative authority cannot reasonably be expected to supply the information in the form requested by the applicant or if the information is already available in another form to which the applicant has easy access. In accordance with the legislative history, the administrative authority may determine this on the basis of what can reasonably be required of an applicant. Applicants must demonstrate that they do not have easy access to the information they are requesting.³⁶ In the case of applications for environmental information, the administrative authority must—‘if necessary and if the information is available’—also supply the information about the methods used to gather the environmental data.

Article 12 of the WOB provides a foundation for central government administrative bodies to establish regulations about charging fees for providing copies of documents or providing extracts or summaries of documents. The relevant regulations are laid down in the Open Government

³⁵ *Kamerstukken II* 2008–2009, 31,751, No. 3, p. 4.

³⁶ *Kamerstukken II* 2004–2005, 29,877, No. 3, p. 9.

(Charges) Decree (*Besluit tarieven openbaarheid van bestuur*).³⁷ The following fees may be charged for supplying copies of documents: fewer than 6 copies, free of charge; 6 to 13 copies, €4.50; and 14+ copies, €0.35 per copy. The charge for providing copies of digital documents must not exceed the cost price. A fee of €2.25 per page may be charged for extracts and summaries. The wording of Article 12 of the WOB does not refer to administrative authorities that are not part of central government. It follows from legal precedent that these authorities may also establish regulations for charging fees to cover the cost of providing copies, extracts and summaries.³⁸

4.4 *Exemptions and Restrictions*

In principle, administrative authorities must grant applications for information contained in documents relating to administrative matters (see Article 3 (5) of the WOB). When deciding whether or not to supply the information, authorities must take account of the exemptions in Article 10 of the WOB and the restrictions on this principle of disclosure that are specified in Article 11 of the WOB.

4.4.1 *Exemptions*

Article 10 of the WOB summarises the grounds for exemption that apply to applications for information (Article 3 of the WOB) as well as to decisions by administrative authorities to disclose information of their own accord (Article 8 of the WOB). Exemptions are sub-divided into two categories.

First, Article 10 (1) sets out four grounds for exemption that are absolute. In other words, if a ground for exemption arises, there is no scope for weighing the interest of disclosure against the interest that the ground for exemption is designed to protect. According to legal precedent, the grounds for exemptions must be interpreted restrictively. The requested information will not be disclosed if it might damage the unity of the Crown (Article 10 (1) (a) of the WOB). The Dutch government consists of the King and the Ministers, and Article 42 of the Constitution stipulates that the Ministers, and not the King, shall be responsible for acts of govern-

³⁷ Bulletin of Acts and Decrees 1993, 112 as amended by Decision of 14 September 2000, Bulletin of Acts and Decrees 2001, 415.

³⁸ ABRvS 22 August 2012, ECLI:NL:RVS:2012:BX5240.

ment. Article 10 (1) (a) of the WOB guarantees that this basic rule cannot be jeopardised by the disclosure of information. This means that information contained in the correspondence between the King and the Ministers is not disclosed.³⁹ Requested information will not be disclosed if it might damage the security of the State (Article 10 (1) (b) of the WOB). This includes, for example, the importance of countering terrorism and guaranteeing military secrets. Case law shows that if an administrative authority uses this ground for an exemption, it has to underpin this with an expert report. The personal view of the Minister who did not want to disclose information about his use of a government-provided service car because this might damage the security of the State is insufficient in that regard.⁴⁰ The third ground for exemption concerns the information that relates to companies and manufacturing processes and was handed to the government in confidence by natural or legal persons (Article 10 (1) (c) of the WOB). Legal precedent shows that any ground for exemption has to be interpreted restrictively. Company and manufacturing data is therefore narrowly defined as ‘if and insofar as such information can be read or distracted with regard to the technical management or production process or as regards the marketing of the products or the circuit of customers and suppliers’.⁴¹ As an example we could point to the title of research on animal testing that was considered outside the scope of this definition.⁴² Lastly the requested information will not be disclosed if the application relates to personal data within the meaning of Article 2 of the Personal Data Protection Act, unless it is apparent that the disclosure of the personal data does not infringe privacy rights (Article 10 (1) (d) of the WOB). The personal data within the meaning of the WBP relate to a person’s religion or philosophy of life, race, political persuasion, health and sexual life, trade-union membership as well as personal data concerning a person’s criminal behaviour or unlawful or objectionable conduct connected with a ban imposed with regard to such conduct.

Secondly, Article 10 (2) of the WOB defines seven grounds for exemption that are ‘qualified’. This means that, in reaching the decision on whether to grant an application for information, the application is subjected to a public interest test: the public interest is weighed against the interests specified

³⁹ ABRvS 25 November 1999, ECLI:NL:RVS:1999:AA4098.

⁴⁰ ABRvS 15 June 2006, ECLI:NL:RVS:2006:AX9049.

⁴¹ Daalder (2015), p. 357. ABRvS 30 November 2016, ECLI:NL:RVS:2016:3165.

⁴² ABRvS 23 December 2015, ECLI:NL:RVS:2015:3976.

in the grounds for exemption. The interest of the applicant is not taken into account in the deliberation. The court comprehensively assesses whether the interest defined in the ground for exemption is relevant and shows restraint in terms of weighing up the interests. The principle of disclosure must outweigh other interests.⁴³ The seven grounds for exemption are as follows: (a) relations between the Netherlands and other states or international organisations; (b) the economic and financial interests of the State and administrative authorities; (c) the investigation of criminal offences and the prosecution of offenders; (d) inspection, control and oversight by administrative authorities; (e) respect for personal privacy; (f) the importance to the addressee of being the first to be able to take cognizance of the information; and (g) the prevention of disproportionate advantage or disadvantage to the natural or legal persons concerned or to third parties.

In practice, the ground for exemption relating to respecting privacy is often cited. Information in this context includes names, bank accounts, employment positions and images. The ground for exemption does not apply if the person concerned has agreed to the disclosure of the information (see Article 10 (3) of the WOB). Also relatively frequently cited is the last ground for refusal to disclose, which functions as a safety net and is formulated in such a way that recourse to it is always possible, either separately or in combination with other grounds for refusal. It is worth noting that this exemption does not apply to a refusal to grant an application for information because granting it would place an unreasonable burden on the capacity of the administrative authority.⁴⁴

4.4.2 *Restrictions*

Article 11 of the WOB contains a special provision that applies to applications concerning information contained in documents drawn up for the purpose of *internal consultation*. ‘Internal consultation’ is defined as ‘consultation concerning an administrative matter within an administrative authority or within a group of administrative authorities in the framework of their joint responsibility for an administrative matter’ (Article 1 (c) of the WOB). This concerns, for example, official recommendations with proposals for administrative decision-making, internal criteria for evaluating decisions, preparatory documents for official meetings and recom-

⁴³ ABRvS 25 March 2009, ECLI:NL:RVS:2009:BH7681.

⁴⁴ ABRvS 7 October 2009, ECLI:NL:RVS:2009:BJ9484.

mendations by lawyers.⁴⁵ Article 11 of the WOB stipulates that no information must be disclosed concerning *personal opinions* on policy contained in internal-consultation documents. A ‘personal opinion’ is defined as ‘an opinion, proposal, recommendation or conclusion of one or more persons concerning an administrative matter and the arguments they advance in support thereof’ (Article 1 (f) of the WOB). The rationale behind this restriction on the principle of disclosure is that ministers, administrative courts and civil servants have the right for opinions put forward during internal consultations to remain confidential.⁴⁶

Article 11 (2) of the WOB stipulates, however, that information on personal opinions on policy may be disclosed, in the interests of effective, democratic governance, in a form which cannot be traced back to any individual. This is a power under which the administrative authority has policy freedom. The court exercises restraint in its assessment of the application and decides only whether it would be unreasonable to refuse to apply Article 11 (2) of the WOB. If those who expressed the opinions in question agree, information may be disclosed in a form which may be traced back to individuals.

4.4.3 *Article 10 of the European Convention on Human Rights*

A successful appeal on Article 10 of the ECHR may result in access to more information than the administrative authority is obliged to provide under the WOB. The criteria for a successful appeal on Article 10 of the ECHR are set out by the European Court of Human Rights in the case of 8 November 2016 (Magyar Helsinki Bizottsag/Hungary).⁴⁷ That ruling shows that under certain circumstances a refusal of a request for access to information to an administrative authority infringes Article 10 of the ECHR. This is the case if the request has an instrumental function in exercising the right to freedom of expression and the right to receive and share information without interference with the public authority. It requires that the purpose of the request is to stimulate the social debate, the request concerns a socially relevant topic, the applicant has a social function as a public watchdog and the government has the information. If the request meets these conditions, this restriction is only justified if it is provided for by law,

⁴⁵ For details, see Daalder (2015), p. 295.

⁴⁶ *Kamerstukken II* 1987–1988, 19,859, No. 3, p. 4.

⁴⁷ ECHR 8 November 2016, ECLI:CE:ECHR:2016:1108JUD001803011 (Magyar Helsinki Bizottsag/Hungary).

serves a legitimate purpose and is necessary in a democratic society. In the Netherlands this legal ruling of the ECHR seems to have changed and nuanced the case law on rights of applicants on access to information under Article 10. Previously the Administrative Jurisdiction Division of the Council of State ruled that Article 10 implies a right on access to information to *anyone* and that the exemptions under the WOB generally constitute a legitimate infringement.⁴⁸ Nowadays the court assesses—in line with the ECHR case law—whether or not the applicant of the WOB request qualifies as ‘a public watchdog’, which is a prerequisite for granting the right of access to public information pursuant to Article 10 of the ECHR.⁴⁹

4.5 *Environmental Information*

A special procedure applies when assessing applications for access to environmental information. A distinction is made between environmental information relating to emissions and environmental information as defined in the Environmental Management Act (*Wet Milieubeheer*). The basis is provided by the implementation of the Aarhus Convention and the EU Directive on public access to environmental information.⁵⁰ It follows from Article 10 (4) of the WOB that the requirement to disclose environmental information on emissions is absolute, even when grounds for exemption are applicable. The rationale is that, given the possible impact of emissions on the environment and human health, it is considered reasonable that government bodies are required to disclose information on emissions, even if one of the exemptions applies. In practice the distinction between environmental information relating to emissions and other environmental information relevant for the assessment is sometimes disputed. The court considered, for example, that underlying data relevant for the data on emissions (fuel consumption at refineries at plant and source levels) is not to be considered environmental information relating to emissions. Concentration data on the emissions per installation (data directly related to the smoke from a chimney) are however considered to fall within the definitions of emissions in the Dutch Environmental Management Act. With regard to other environmental information, the

⁴⁸ ABRvS 14 May 2014, ECLI:NL:RVS:2014:1708.

⁴⁹ ABRvS 22 February 2017, ECLI:NL:RVS:2017:498.

⁵⁰ *Kamerstukken II* 2004–2005, 29,877, No. 3.

exemptions in the WOB apply to a limited extent. Article 10 (6) of the WOB, for example, states that the exemption of Article 10 (2) (g) of the WOB (the prevention of disproportionate advantage or disadvantage to the natural or legal persons concerned or to third parties) does not apply to environmental information. Therefore an administrative authority could not refuse to disclose information on agriculture census data (data about crops, croplands, grassland and the business area) referring to the exemption of Article 10 (2) (g) of the WOB.⁵¹ In the case of environmental information, the absolute exemption regarding data relating to companies and manufacturing processes becomes a ‘qualified’ exemption, the exemption relating to economic or financial interests of an administrative authority may only be applied in the case of actions that are confidential, and the general exemption (disproportionate advantage or disadvantage) does not apply at all. Article 11 (4) of the WOB stipulates that, in the case of environmental information, the interest of protecting the privacy of personal policy opinions must be weighed against the public interest.

4.6 Information Provided Voluntarily

4.6.1 The Legal Framework of the WOB

In addition to stipulating that administrative authorities must provide information on request, the WOB stipulates (in Article 8) that those authorities must also provide information of their own accord regarding policy and its preparation and implementation, ‘whenever the provision of such information is in the interests of effective, democratic governance’. This disclosure obligation pursuant to Article 9 of the WOB also applies to policy recommendations that the authority receives from independent advisory committees. Article 8 (2) of the WOB stipulates the form in which the information is to be supplied, namely, in a comprehensible form and in such a way as to reach the interested party and as many interested members of the public as possible at a time which will allow them to make their views known to the administrative authority in good time.

Article 8 of the WOB is an instruction to administrative authorities, and this means that citizens cannot, at law, require authorities to provide information voluntarily.⁵² It follows from legal precedent that Article 8 of the

⁵¹ ABRvS 30 June 2010, ECLI:NL:RVS:2010:BM9643.

⁵² *Kamerstukken II* 1986–1987, 19,859, no. 3, p. 29. ABRvS 3 September 2014, ECLI:NL:RVS:2014:3263.

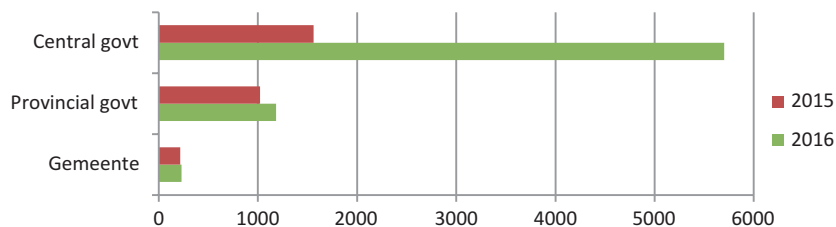


Fig. 5.4 Access to government data

WOB does provide a foundation for taking decisions within the meaning of Article 1:3 of the GALA. Decisions on ‘active’ disclosure should be based on the same material assessment as decisions on ‘passive’ disclosure. Parties whose interests are directly affected by active disclosure of information have the same recourse to legal protection as parties whose interests are directly affected by a disclosure decision based on an application under Article 3 of the WOB.⁵³

4.6.2 *Other Channels of Proactive Information and Communication*

Openness may involve more than the voluntary disclosure of government information. In certain cases it may also include government activities designed to give citizens the opportunity to play an active part in law-making and decision-making, for example, voluntary disclosure of information held by the government, engaging citizens in the creation of laws and the preparation of decisions.

Voluntary Disclosure of Information Held by the Government

The Dutch government is generating more and more digital information and data files. This concerns data gathered for the purpose of, and in the course of, performing its public service task (e.g. data on traffic, safety and education and on the awarding of funding or issuing permits). If unlimited free access is granted to this information, it becomes ‘open data’.

Usage of data depends on what information is disclosed and on the degree of interest in it. These two factors determine the importance of allowing public access to the data. What is the situation regarding public access to government data in the Netherlands? If we look at the years 2015 and 2016, we see the following (Fig. 5.4).

⁵³ ABRvS 31 May 2006, ECLI:NL:RVS:2006:AX6362.

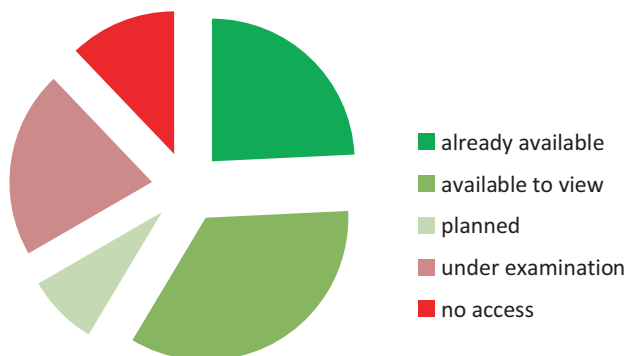


Fig. 5.5 Data sets: public/non-public

The figure shows the number of data sets disclosed by each level of government. When we look at the figure, we notice two things. First, there is a striking increase in the number of data sets disclosed at central government level. This is mainly due to the fact that Statistics Netherlands (CBS, *Centraal Bureau voor de Statistiek*) granted access to all its data sets in this period. Second, municipal authorities make far fewer data sets available than central government. However, there is no information available on the number of data sets disclosed in comparison to the total number of data sets held by the various levels of government. It is therefore difficult to establish what progress the levels of government have made with regard to disclosing data.

A degree of insight is provided by inventories of the data sets of different ministries. The figure below shows the situation regarding the disclosure of these (Fig. 5.5).⁵⁴

The figure shows that, currently, only a minority of data sets are public but also that there appear to be few obstacles to disclosing the vast majority of available data sets.

All in all, the trend appears to be that, gradually, more and more government data are being disclosed. However, it is not yet clear why certain information has been disclosed while other information has not.

⁵⁴This concerns a total of 944 data sets.

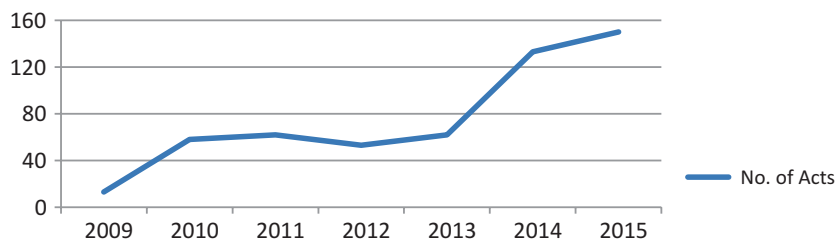


Fig. 5.6 Internet consultation

Engaging Citizens in Law-Making

In the Netherlands, internet consultation is often used as an instrument for involving citizens in law-making. Draft legislation, Orders in Council (*Algemene Maatregelen van Bestuur*) and ministerial regulations are placed on the website 'Internetconsultatie' for a period of time (usually one month). Anyone can respond by filling in an online form.

Visitors to the site who respond are kept informed about the process. At the end of the permitted response period, all the responses are posted on the website. Later, usually after the draft legislation has been discussed by the Council of Ministers (*ministerraad*), a report is posted on the website. The report describes how the responses have been taken into account. When the draft legislation is presented to the House of Representatives (*Tweede Kamer*), the outcome of the consultation is included in the explanatory memorandum.

The purpose of internet consultation is to improve the transparency of the legislative process and contribute to the quality of legislation. The responses to the draft legislation give the government the opportunity to make use of the knowledge and insights in society regarding the subject of the legislation. This may result in amendments to the legislation that enhance its quality and support base.

Research into internet consultation shows that it is used with increasing frequency, particularly in recent years (Fig. 5.6).

In the first few years, the number of consultations fluctuated around 60. In 2014 the figure increased to 133 and further to 150 in 2015.⁵⁵

⁵⁵This is an estimate based on the number of laws subject to public consultation up to the end of July 2015 (88).

The number of responses received with regard to internet consultation varies. The piece of legislation for which the most responses were received was the Nature Act (*Wet natuur*), on which there was public consultation in 2011 (5,428 responses). Two other pieces of legislation also generated more than 1,000 responses. If we look at the ten acts that received the most responses, we see that the one in tenth place received 137 responses. The average number of responses is slightly fewer than 20. Many pieces of legislation did not generate more than five responses.

The research does not show what percentage of the legislation dealt with each year is subject to public internet consultation. In the light of openness, it is particularly important that members of the public have the opportunity to express their views on planned legislation.

Engaging Citizens in the Preparation of Decisions

We can be brief about this aspect of openness. The basic principle of administrative law in the Netherlands is that only interested parties need to be involved in the preparation of decisions. The term ‘interested party’ is defined as ‘a person whose interest is directly affected by an order’.

It does happen, however, that persons other than interested parties are involved in preparing certain decisions. Certain statutory regulations stipulate that ‘anyone’ should have the opportunity to give their views on the content of decisions during the preparatory phase. This concerns decisions on the adoption of zoning plans and decisions relating to infrastructure projects. In addition, the government may—even if it is not required to do so—choose to allow persons other than interested parties to express their views on draft decisions. The GALA makes provision for this (Articles 3:10 to 3:18). There is no known research on the frequency with which administrative authorities voluntarily make use of these provisions.

5 LEGAL PROTECTION AGAINST THE REFUSAL TO PROVIDE INFORMATION

5.1 Introduction

All applications to disclose public information need a response from the administrative authority. The WOB stipulates that the competent authority decides within four weeks and in requests concerned with environmental information within two weeks. Before it decides the administrative authority may offer the parties concerned an opportunity to submit views

about the disclosure of information that can affect their interests; in that case the decision is postponed (Article 6 (3) WOB). The decision has to be accompanied by a statement of reasons and must contain information on available legal remedies. In accordance with the general provisions of Chaps. 6, 7 and 8 of the GALA, the law provides for legal remedies against the decision on the application, regardless whether access to the information was granted or refused.

In this section we will briefly explain some of the legal provisions arranging for legal protection against such decisions. These provisions of the GALA are general in nature and apply to all legal procedures aimed at the judicial review of decisions by administrative authorities. More specifically, we pay attention to two legal questions that have proven to be particularly relevant when access to information is at stake. *Firstly*, these concern the question what are the possibilities for legal protection against untimely decision-making by administrative authorities. *Secondly*, these concern the question whether the applicant can abuse his right to apply for access to information in such a way that it could be a ground for refusing access to the information and also a ground for the administrative courts to judge the appeal against WOB decisions inadmissible, leaving the applicant without legal protection.

5.2 *Objection Procedures, Court Procedures, Preliminary Injunctions*

Applicants not satisfied with an incomplete answer, an insufficient answer or a refusal as a response to their request for access to information are provided with legal protection in accordance with the general (procedural) rules on judicial review stipulated in Chaps. 6, 7 and 8 of the GALA. The same is true for all interested parties concerning any decision under the WOB. All interested parties whose interests are directly affected (Article 1:2 of the GALA) may appeal against a decision (Article 1:3 of the GALA) made by an administrative authority (Article 1:1 of the GALA) but are required to first lodge an objection with the administrative authority that decided on the request in order to allow the competent authority to reconsider its decision.⁵⁶ If the decision on the objection remains unsatisfactory, the interested party may turn to the District Court (administrative sector) for judicial review

⁵⁶The requirement of first lodging an objection is in accordance with Articles 8:1 and 7:1 GALA.

of the decision by filing an appeal with the court. Appeal against the District Court's judgement is allowed and may be filed with the ABRvS. All procedures are in place to allow applicants to safeguard their legal rights and must be instigated within six weeks after publication of the decision or judgement. As in practically all procedures before the administrative courts, there is no mandatory legal representation. However, when an interested party files an appeal, there is an obligation to pay a relatively small court fee. The administrative courts review the lawfulness of decisions made by an administrative authority *ex tunc* without considering facts and circumstances that became relevant after the date of the decision. In reviewing the appealed decision, Dutch administrative courts attach great significance to the administrative authority's observance of the principles of due care and adequate reasoning. The exercise of discretionary powers by administrative authorities triggers the courts to limit judicial review to the question whether the administrative powers have been exercised reasonably. Where the court carries out this test of reasonableness, it tends to concentrate its review of the decision on the more procedural standards which the administrative authority has to observe.

When a decision based on the WOB mandates a (partial) disclosure, interested parties may wish to lodge an objection or file an appeal against such a decision. When the information or the documents will become public before their disclosure is reconsidered in the objections procedure or the court procedure, there can be a need for a preliminary injunction (Article 8:81 of the GALA). In such a case, an administrative court will be more likely to find an interim relief (meaning that the information shall not be made public yet) than in cases where the decision entails a refusal and the administrative court is asked for an interim relief meaning that the requested information will be disclosed. In the main administrative court procedure against decisions to refuse access to information, the courts are competent to demand information of the administrative authority. In cases concerned with the WOB, Article 8:29 of the GALA is of particular relevance. It allows administrative authorities to send information to the court asking it not to disclose the information to the applicant. This is what could occur in a case that concerns the refusal of a request to disclose information. Only in cases where the applicant explicitly allows the court to take a look at the information provided and allows the court to decide the case on the basis of that information even though the applicant didn't have access to the information could the information influence the verdict of the court. When the administrative court decides that there is no (reasonable) ground to refuse disclosure, it could order information to be disclosed.

5.3 *Legal Protection Against Untimely Decisions*

Legal protection can also be necessary in cases of failure to give timely decisions. In the Netherlands it has proven to be common that administrative authorities are not able to decide on all requests for information within the time frame granted by the WOB. In what way could an interested party force an administrative authority to provide a substantive response to a request? Since judicial review by administrative courts is only open against decisions by an administrative authority and untimely decision-making does not qualify as such a decision, the GALA needs to provide regulation for this situation. It states in Article 6:2 that the fact that an administrative authority has not been able to decide within the prescribed time period will be treated as a decision for the purpose of legal protection. Administrative courts are therefore competent to rule in such situations. Important amendments in 2009 stipulate that lodging an objection is no longer required against untimely decision-making, which means that any interested party may now file an appeal directly with the court against inaction of an administrative authority. The only requirement is that the interested party sends—after the decision time has expired—a notice of default to the administrative authority and then waits two weeks before filing the appeal (Article 6:12 of the GALA). The court should pronounce judgement within eight weeks (Article 8:55b of the GALA). If the court finds that a decision was not made within the stipulated time period and a decision is still not made, it will order the administrative authority to decide within two weeks after the judgement.⁵⁷

5.4 *Abuse of the Right to Apply for Access to Information*

The WOB appears to be legislation that is fairly open to misuse. For persons involved in a dispute with the government, the WOB is a weapon that is used to throw a spanner in the works of governance. Dealing with WOB applications is a time-consuming process. The larger the number of requests and/or the more complex they are, the more time-consuming it is for an administrative authority to process them.

One of the most spectacular amendments of the GALA is related to timely decision-making and the system of judicial review just described.

⁵⁷ This court order is subject to a penalty, usually €100 a day with a maximum of €15,000. Administrative courts can assess whether the administrative authority has made its decision known within the prescribed time frame and order the administrative authority to decide.

Next to the new possibility to file an appeal against untimely decision-making directly with the court, the 2009 amendment of the GALA introduced the penalty that is legally forfeited in each situation where an administrative authority has not responded to an application within the set time period and two weeks have passed since the applicant has sent a notice of default to the administrative authority after the time period for a response has expired (Article 4:17 of the GALA). The penalty changes over time and runs up to a maximum of €1,260 after 42 days. This penalty is paid by the administrative authority to the applicant and has unexpectedly been an incentive to file as many requests for disclosure of information as they can with a view to making money.

Although the introduction of the penalty was of course also a reason for administrative authorities to aim at deciding within the time period provided, there have been some remarkable and striking examples of requests that seem to serve no other purpose than the applicant's wish to collect the penalty payments. Since anyone is allowed to request disclosure of information, the possibilities seem endless.

Soon after the amendment of the GALA was introduced in 2009, the impression arose that there was extensive improper use of the WOB. A number of studies provide information on this. A study in 2010 looked in the first place at how much work the applications create for the relevant administrative authorities.⁵⁸ The survey asked what proportion of applications for information took more than ten working days to process. In the study, these were categorised as 'complex' applications. The study showed that there were considerable differences between the different categories of administrative authorities.

Figure 5.7 shows that ministries receive relatively more complex applications than municipal authorities or the police.

The study of 2010 also looked at inappropriate applications for information, differentiating between three types. Applications may be inappropriate because the effect they are designed to have is that the administrative authority does not give a timely decision and is therefore required to make a penalty payment to the applicant. Applications designed to frustrate decision-making are also deemed inappropriate. They are mainly submitted by applicants who make many and/or complex requests. There are citizens who submit hundreds of applications every year to the same administrative authority. A third category comprises requests from appli-

⁵⁸ Van Haeften et al. (2010).

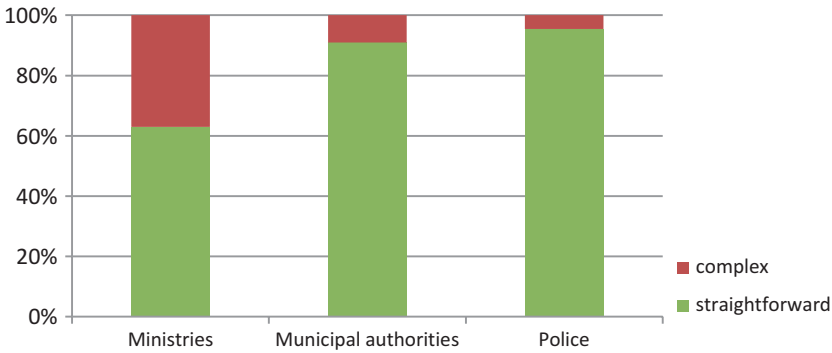


Fig. 5.7 Proportion of straightforward and complex applications

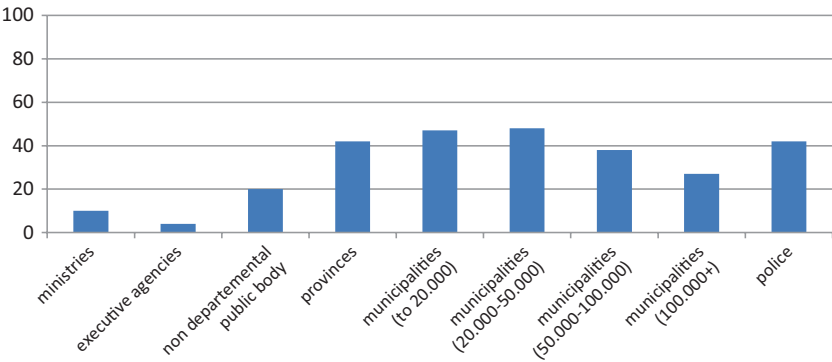


Fig. 5.8 Inappropriate applications for information submitted to different categories of administrative authorities (as a percentage of the total number of applications)

cants who obsessively gather information. The aim of this type of application is not to frustrate the functioning of government, although they do have this effect.

What percentage of applications for government information may be deemed inappropriate?

Figure 5.8 shows that the number of these applications is relatively high. Provincial authorities, small and medium-sized municipal authorities and the police all reported that more than 40% of applications for informa-

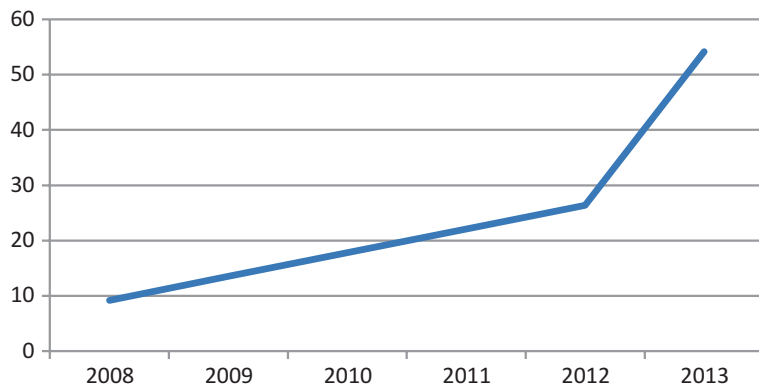


Fig. 5.9 Applications submitted for financial gain

tion were inappropriate. The number of inappropriate applications with a view to financial gain and the number that aim to frustrate decision-making were roughly equal. Together they accounted for 95% of inappropriate applications. The remaining 5% were requests from applicants who obsessively gather information. For most administrative authorities, the categories ‘financial gain’ and ‘frustrating decision-making’ were, quantitatively speaking, roughly equal.

A study carried out in 2014 also looked at inappropriate applications.⁵⁹ The officials who were interviewed were asked how many applications, in their view, were made with a view to financial gain. A spectacular rise in such applications is evident (Fig. 5.9).

The figure shows that 9% of applications submitted in 2008 were made with a view to financial gain. This figure rose to 26% in 2012 and 54% in 2013. It should be noted that the information in the report was obtained from self-reports by municipal authority officials. It is possible that this gives a slightly distorted picture (e.g. because the number of applications geared to financial gain was underestimated in the past and the number of recent requests made for that purpose is overestimated). Even if this is the case, the increase is still considerable.

The survey also asked about the possible consequences of applications made with the aim of financial gain. As mentioned above, an administra-

⁵⁹ <http://docplayer.nl/11253612-Afrekenen-met-de-wob-onderzoek-naar-oneigenlijk-gebruik-van-de-wet-openbaarheid-van-bestuur-bij-gemeenten-en-politie.html>.

tive authority that does not give a timely decision on an application for information may be declared to be in default, and—if the notice of default does not result in a decision within two weeks—the applicant is entitled to receive a penalty payment from the authority. It appears that administrative authorities, in following up requests for information, are not declared to be in default very often. In 2012, 4% of applications ultimately resulted in notice of default due to failure to give a timely decision. The figure for 2013 was 6%. The fact that an administrative authority is declared to be in default does not necessarily mean that it will be liable to pay a penalty. In 2012 as well as 2013, only 0.6% of applications ultimately resulted in penalty payments. Finally, the survey asked how often applications result in court cases, as a result of which decisions are quashed and the administrative authority is required to pay the applicant's legal costs. In 2008, this was the result of 0.1% of applications. This figure rose to 0.5% in 2012 and 0.9% in 2013. These numbers are low, but show a clear increase.

All in all, government bodies were experiencing a growing burden from applications for information that—at least in the perception of the civil servants who have to deal with them—were not primarily geared to obtaining information but to obtaining financial gain or designed to frustrate decision-making processes. In terms of the amount of time it took administrative authorities to prepare decisions on applications, the effect was considerable. However, the financial consequences (penalty payments, orders for costs) were limited.

5.5 *Case Law and Legislation Aimed at Preventing Abuse*

5.5.1 *Case Law*

One of the legal questions that has been at the centre of the case law that emerged in the past years is whether it would be possible to limit the possibilities of applicants—or even their representatives—to abuse the competence to file requests on the basis of Article 3 of the WOB. Article 3:13 of the Dutch Civil Code (*Burgerlijk Wetboek*, BW) states explicitly that private persons and legal persons can use their competences in such a way that it constitutes abuse. Article 3:15 of the BW even stipulates that the provision for abuse of competence is applicable in other legal relationships than those in private law insofar as the nature of this legal relationship does not oppose it. Never had an administrative court ruled that the competence of filing a request could be abused by either citizens or their representatives.

On 29 November 2014, the ABRvS however pronounced judgement in a case that had so many special circumstances that the case triggered the highest court in these matters to conclude that the appeal by the applicant was inadmissible because of abuse of both the competence to file a request and to appeal against the response to the request. The case was about a woman that did not agree with a traffic fine. As a consequence her representatives filed several requests for the disclosure of information related to the traffic fine although they knew this information is also available in the legal procedures against the traffic fine. Several other aspects of the case lead the court to the conclusion that the only reason for filing these requests is the possibility the administrative authority could forfeit penalties and that the competence of filing the requests and filing an appeal against the decisions about the requests was abused (Article 3:13 of the BW) and that the appeal is therefore inadmissible. This conclusion was however not reached light-heartedly and is closely related to the specific circumstances of the case. The court's statement goes as follows:

For the inadmissibility of an appeal brought to court because of abuse of the competence to appeal against a decision, compelling grounds are required, since the inadmissibility of the appeal will deny the interested party the right of access to court. This is especially true when it comes to an appeal brought by a citizen against the government in view of the – sometimes far-reaching – powers of the government which citizens usually do not have. In light of that, and in view of article 3:13 of the BW and the decision of the Division of 21 July 2003 in Case No. 200302497/1, in these sorts of cases such compelling grounds are present, among other things, if competences have been so obviously used without a reasonable purpose or for a purpose other than that given to them, that the use of those competences proves bad faith. As follows from the ruling of 21 July 2003, a more or less excessive appeal to government-provided facilities generally does not in itself constitute an abuse of competence. Any appeal to these facilities causes costs to the government and the government will have to bear these costs. However, the number of times a particular right or a particular competence is used can, in combination with other circumstances, contribute to the conclusion that the competence was abused.⁶⁰

The conclusion in this case was that the legal representatives had used the competence to submit requests on the basis of Article 3 of the WOB in bad

⁶⁰ ABRvS 29 November 2014, ECLI:NL:RVS:2014:4129.

faith since they used it with obviously no other purpose than to collect money from the government and for another purpose than the purpose for which that competence was given. According to the court, this applies equally to the use of the competence to appeal to the court. The appeal is therefore inadmissible. Although this judgement means a substantial change in the case law of the highest administrative court of the Netherlands, legal scholars are reluctant to acknowledge that this judgement can easily be applied in many cases since the specific circumstances of the case seem to be very relevant and it is not entirely clear what circumstance would lead the courts to rule that there are compelling grounds for an exception to the right of access to justice.

5.5.2 *Legislation*

Despite the new case law that has emerged, resistance against requests that seem solely aimed at financial gain grew fast and government bodies and Members of Parliament asked the government to intervene. Consequently the government introduced a draft legislative bill to amend the WOB in order to remove the element that potentially makes it so lucrative to request the disclosure of information. On 1 October 2016, this legislative act came into force.⁶¹ It stipulates that those provisions in the GALA concerned with the forfeiting of a penalty for untimely decision-making are, effective immediately, no longer applicable to requests on the basis of the WOB. Furthermore it allows the applicant to choose between directly filing an appeal with the administrative court and lodging an objection with the competent authority when a decision is not made within the decision period. This means that the rights of applicants were better safeguarded before the introduction of these amendments, but that the benevolent applicants have to suffer the consequences of the actions of those malicious applicants that only request disclosure of information for financial gain.

5.6 *Empirical Data About Court Cases Relating to Applications for Information*

How often do requests for information result in the lodging of objections with the administrative authority or in court appeals? And in such cases, how often does this result in the authority retracting its decision to withhold disclosure or the court requiring it to supply the requested information?

⁶¹ Act of 13 July 2016, Bulletin for Acts and Decrees 2016, 301.

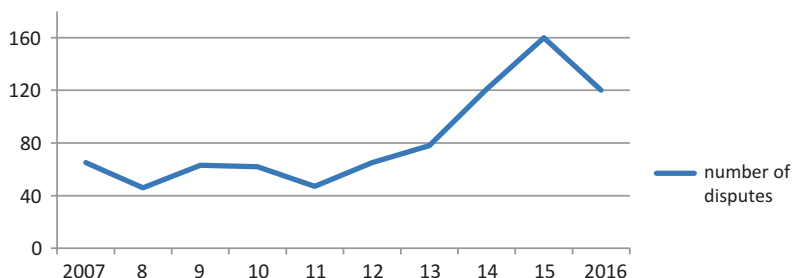


Fig. 5.10 Number of disputes taken to appeal concerning applications for information

There are very few figures available to answer these questions. For the overall number of requests, we know only how many in 2010 resulted in objection and appeal procedures. In order to find out something about the processing and outcomes of rejected applications for information, we must refer to the information available on the website of the ABRvS, the highest Dutch administrative court that deals with disputes concerning government decisions in responses to applications for information. The ABRvS publishes all its rulings on the internet.⁶² This makes it possible to obtain an accurate picture of the number, nature, processing and outcomes of appeals against decisions to withhold disclosure. Indirectly, the rulings also provide information on court cases at first instance.

The first thing we notice when looking at the figures on appeal procedures is the substantial increase in the number of appeals relating to information requests.

Figure 5.10 shows that the number of procedures to 2012 varied between 50 and 75 per year. It then rose to 160 in 2015 and fell to 120 in 2016.

We have collected information on the 120 procedures that resulted in a ruling in 2016. Who brought the appeal? What was it about? Who won the appeal?

In the first place, it is notable that more appeals are brought by citizens than by administrative authorities. In 77% of cases the appeal was brought by the citizen, in 18% of cases by the administrative authority and in 5% of cases by both.

⁶² <https://www.raadvanstate.nl/uitspraken.html>.

The number of appeals brought by citizens or administrative authorities, respectively, depends partly on the outcome of the appeal at first instance. Only the losing party has a reason to bring an appeal. It is known that, in approximately 30% of appeals, the court finds in favour of the appellant and in 70% of cases in favour of the defending administrative authority. It is also known that administrative bodies that lose an appeal in the administrative court are more likely to bring an appeal against the decision than citizens who lose an appeal.⁶³

If we look at appeals concerning information requests in comparison to all other appeals, we see that the over-representation of appeals brought by citizens in the latter category is much greater than in appeals concerning information requests. Looking at all appeals, 88% are brought by citizens (compared to 77% in the case of information requests), 8% by administrative bodies (compared to 18% in the case of information requests) and 4% by both (compared to 5% in the case of information requests).⁶⁴ There are two possible explanations for the fact that cases involving applications for information are brought relatively more often by administrative authorities. It is possible that courts more often find against administrative authorities in this category. It is also possible that, if courts find against administrative authorities in this type of case, the authorities quite often lodge a further appeal.

A second notable finding from the analysis of appeal procedures involving applications for information is that, in half the cases, the object of dispute is the question of whether an application constitutes misuse of the law. As we have seen, in November 2014 the ABRvS ruled that, in certain circumstances, an application for information may be regarded as misuse of the law. If this is the case, the administrative authority must automatically refuse the application. Half the number of appeals now concern decisions by administrative authorities to refuse to grant an application for information because it is deemed to constitute misuse of the law. If citizens bring an appeal, in 43% of cases, this is because they do not agree with the decision of the lower court that the application involves misuse of the law. If administrative authorities bring an appeal, in no less than 60% of cases, this is because they do not agree with the lower court's decision that the application did *not* involve misuse of the law. More than half the total number of appeals relate to the question of whether the administra-

⁶³ If the citizen loses, the probability that he/she will lodge an appeal is 43%. If the administrative authority loses, the probability is 11%.

⁶⁴ Marseille and Wever (2016), p. 848.

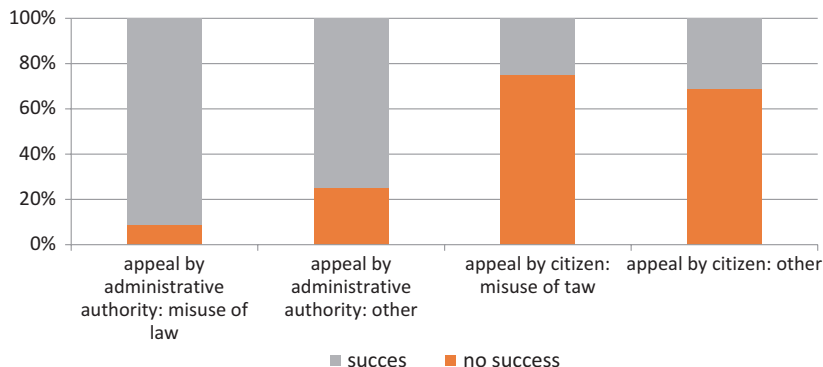


Fig. 5.11 Object of dispute and chance of winning (percentage of appeals brought)

tive authority was justified in refusing to grant the application for information on the ground that it constituted misuse of the law.

With regard to the outcomes of appeals, there is a difference between appeals lodged by administrative authorities and those lodged by citizens. If administrative authorities lodge an appeal, they have a 69% chance of success. Citizens who lodge an appeal have a 30% chance of success. In comparison to administrative court cases in general, administrative authorities have a 50% chance of success if they lodge an appeal. Citizens who lodge an appeal have a 17% chance of winning. Appeals concerning information requests differ from normal administrative appeals in two respects. In the first place, administrative authorities are more likely than citizens to win normal appeals than they are to win disputes on information requests. It is even more striking that, in disputes on information requests, the ruling of the higher court is more likely to differ from that of the court at first instance than in normal administrative disputes. In disputes on applications for information, the decision of the appeal court differs from that of the court of first instance in 34% of cases. In normal cases the figure is only 19%.⁶⁵

Also notable are the differences in the likelihood of citizens and administrative authorities winning disputes on inappropriate use, compared to other disputes involving requests for information.

Figure 5.11 shows that an administrative authority's chance of success in an appeal is greater if the object of dispute is whether the application for information constitutes misuse of the law than if the dispute relates to the

⁶⁵ Marseille and Wever (2016), p. 847.

content-related criteria on which decisions to disclose or withhold information are based. In the case of citizens, the reverse is true.⁶⁶ The figure also shows that, irrespective of the object of dispute, the appeal court is more critical of lower court rulings if they go against the authority than if they go against the citizen.

Analysis of the rulings of higher administrative courts strongly indicates that, if an administrative authority decides to refuse an application for information because it considers it to constitute misuse of the law, the decision is more likely to survive a court review than a decision to refuse disclosure for other reasons. How can this result be explained? Partly given the intense scrutiny by the courts of decisions to refuse disclosure of information on the ground of misuse of the law, it can be assumed that administrative authorities are fairly cautious in refusing applications on that ground. The fact that, despite this, almost half of appeals relate to misuse of the law reinforces the impression that this is a genuine problem for administrative authorities. The question is whether the introduction of the WOO will solve this problem, now that almost half the inappropriate requests are made with a view to frustrating the decision-making process, rather than with a view to extracting a penalty payment from the administrative authority on the basis of its failure to give a timely decision.

6 TOWARDS A NEW LEGISLATIVE ACT ON TRANSPARENCY?

There is a very realistic scenario that the Netherlands will have a new act on access to information in the near future. Considering the importance of good democratic governance and the practical difficulties with the implementation of the WOB, including the problems mentioned in the previous section such as the fact that information is usually not disclosed actively by administrative authorities and that there are many reasons for not disclosing information on the basis of an application, several Members of Parliament used their right to submit an initiative bill to Parliament in 2012. The initiative bill was intended to introduce a new act that would not have the implementation problems of the WOB. Goal of the submitted initiative bill, called *Wet open overheid* (WOO, Open Government

⁶⁶ It should be noted that—perhaps counter-intuitively—it was quite possible that citizens would also have been more likely to win the appeal if it had concerned the issue of misuse than if it had concerned the question of whether the application met the content-related criteria for the disclosure or withholding of information.

Act), is to replace the WOB.⁶⁷ After the draft legislative bill was submitted to Parliament, deliberations started in order to seek a majority for it. Following the reactions from political parties, the government and the official advice of the Council of State on the proposed bill, the initial proposal for the WOO was amended on several points. As we mentioned above, the bill was adopted by the House of Representatives in April 2016 and will be addressed in 2017 by the Senate.⁶⁸ Whether the WOO will be enacted and come into force is not sure however. Despite the association of Dutch municipalities endorsing the goals of the new regulation, it considers the WOO as adopted by the House ‘impractical and too expensive’. Also the first impact analysis we mentioned in Sect. 2 concludes that this is indeed the case. As a consequence of the act, governments in the Netherlands will have to publish billions of documents each year and will have to invest in information technology and necessary training for civil servants. On top of that, the act will add to the complexity of the regulation of transparency. Deliberations of the WOO as adopted by the House will not commence in the Senate before another study on the impact of the new act is completed. Since the bill is an important indication of the law concerning public access to government information in the future, this section is dedicated to providing a short overview of the key changes proposed by the WOO.⁶⁹

The purpose of the bill is to make government bodies and quasi-government bodies transparent to the public. According to the explanatory memorandum, the importance of public access to public information for the democratic rule of law, for civilians, for government and for economic development will be better served by the new regulation. Public access to public information is explicitly stipulated in Article 1.1 WOO that provides all citizens the right to access to (records with) public information: ‘Everyone has the right to access public information without having to state a reason for their interest, subject to limitations prescribed by law.’ The WOO has a wider scope than the WOB (Articles 2.2 and 2.3 of the WOO). Where the WOB particularly applies to administrative authorities as defined in Article 1:1 of the GALA, the WOO stipulates that the main provisions of the legislative act also apply to other public institutions, such as the House and the Senate and the Council for the Judiciary, but also to

⁶⁷ See *Kamerstukken II* 2011–2012, 33, 328, No. 2.

⁶⁸ See for the most recent text in *Kamerstukken I* 2015–2016, 33, 328, No. A.

⁶⁹ Van der Sluis (2016a, 2016b).

the Council of State and the Ombudsman. The proposal stipulates that entities in the semi-public sector should be required to provide access to information. On the basis of the new legislative act, an Order in Council shall designate those semi-public authorities that shall be subject to the WOO regulation. This can concern organisations that have public authority vested in them and have a duty to defend the public interest, organisations that are granted more than €100,000 a year from public funds or whose shares are owned by public entities for more than 50%. In this Order in Council, it must be stipulated to what specific information the designation relates. For example, when the information concerns the use of public funds, the protection of the public interest and the adoption of decisions relating to other topics when administrative authorities influence these decisions. Specific administrative authorities will have to be indicated in the Order in Council to disclose the information on behalf of the designated organisations; the designated organisation is obliged to immediately provide information at the request of the administrative authority.

Like the relevant regulation, we discussed in the sections above the WOO makes a distinction between active and passive disclosure. Active disclosure concerns spontaneous disclosure of documents and information. Passive disclosure concerns the responding to requests for access to information. The WOO aims to increase and broaden the government's duty to disclose documents and information (Section 3 WOO). For this purpose, the act stipulates a list of categories of information that must be published (Article 3.3 WOO). They include laws, other general binding regulations, decisions of general application, emissions data, information that provides insight into the organisation and operation, including the tasks and responsibilities of the departments, and information on the accessibility of government bodies and their departments and how a request for information may be submitted. One of the main changes is that WOO introduces a 'Transparency Register'. This public Transparency Register is mandatory, is held by administrative authorities and provides a register of all documents held by them.

Those who drafted the legislative bill introducing the WOO have been aware of the problems concerning the abuse of the ample opportunities to submit requests for information. Therefore, the WOO introduces an explicit provision to prevent abuse (Article 4.6 of the WOO). The article reads: 'If the applicant clearly has a different purpose than obtaining public information or the application is obviously not related to an administrative matter, the administrative authority can – within two weeks after receipt of

the request or immediately after it is clear that the applicant apparently has a different purpose than the disclosure of information – decide not to process the request.’ Substantive examination of the application can therefore be dispensed with in cases of evident abuse of the broad duty of administrative authorities to make information public. Should a request be processed because there is no abuse, then the decision period is—as it is in the WOB—four weeks. Since some specific amendments to the WOB came into force on 1 October 2016 (see Sect. 4), the legal effects of untimely decision-making by an administrative authority in the WOB are aligned with those proposed in the WOO. The new bill stipulates that the administrative authorities in this case are not subject to a penalty. The applicant also has the choice to either lodge an objection or directly file an appeal with the administrative court in order to have it declare that the decision was indeed not taken in a timely manner. Prior written notice of the administrative authority—like it is under the amended WOB—is not required.

The substantive rules for granting or refusing access to public information on the basis of an application will change slightly under the WOO. The basic premise remains the same however: anyone can submit a request for information and does not have to state an interest for his application for access to information. Similarly as under the WOB, the substantive assessment of applications for access to information under the WOO will be fundamentally aimed at the disclosure of the requested information. All grounds for refusing to make the information publicly accessible shall be explicitly stipulated in the WOO itself. The exceptions to disclosure are virtually identical to those in the current WOB. There are however some differences. One relevant difference is that ‘business and manufacturing data’ is no longer to be subsumed under the absolute but under the relative grounds for refusal. This means that disclosure of information can only be refused in those cases where the interest of disclosure is outweighed by the importance of confidentiality of business and manufacturing data, often provided to the government in confidence by companies or industry and other businesses that are sensitive for competition. This absolute ground for refusal under the WOB is thus changed into a relative ground under the WOO. Another relevant change is the fact that one specific ground for refusal that served as a residual category under WOB will not return in the WOO. Refusing disclosure when ‘disproportionate advantage or disadvantage would occur’ is no longer a ground for refusal under the WOO. Finally, there is a significant change in the regulations

regarding applications for access to information that could be refused on the basis of the grounds for refusal stipulated in the WOO. All such applications may nevertheless be granted when there are compelling reasons to disclose the information or documents despite the grounds for refusal. Also historical, statistical, scientific or journalistic research could be a reason to provide access to information such as competitively sensitive business and manufacturing data. Conditions may be attached to this reason for providing access to this information, including the condition that the information obtained is not to be distributed further without prior decision of the administrative authority. Of great importance for administration of justice in general besides the changes mentioned here is that information and documents should be publicly accessible when this information is older than five years unless the administrative authority is able to explain why the grounds for refusal stipulated in the WOO outweigh the public interest of disclosure despite the passage of time.

In addition to innovations mentioned above the WOO could bring to the Dutch system if adopted in the Senate, it also seems appropriate to pay attention to a proposed instrument of the bill that did not survive deliberation in the House. Originally the proposal for the new act also introduced a so-called Information Commissioner. The bill stipulated that there would be an Information Commissioner that will promote and stimulate the implementation and the proper application of the law, to supervise and to provide advice to administrative authorities on transparency. The idea was that applicants who had their application refused could file an appeal against that decision with this Information Commissioner. Due to criticism concerning this part of the proposed legislation, the Information Commissioner as an institute is not reflected in the legislative act the House adopted. For those in favour of the introduction of an Information Commissioner, the only consolation is that the law will be evaluated and that the evaluation shall pay attention to whether the introduction of an Information Commissioner is necessary.

Finally, it seems rather appropriate to reiterate the important perspective that we also mentioned at the beginning of this section and in Sect. 2. Although the House adopted the bill in April 2016, it remains to be seen whether the Senate will give its approval to the WOO. All political parties and government authorities concerned endorse the idea of broad public access to government information that is deemed so important for effective, democratic governance. However, they differ on whether the Open

Government Act (*Wet open overheid*, WOO) provides the appropriate instruments and makes fitting choices to achieve its goal of an open government. It is therefore far from certain that this act will indeed come into force.

7 CONCLUSION

The WOB offers an adequate legal framework for the promotion of a transparent government in the Netherlands. However, the law itself and the way in which it is applied has a number of disadvantages. Among other things, because anyone can request access to information, the right to apply for information is easy to abuse. In addition, the WOB implements a large number of exceptions to disclosure that provide the government with sufficient grounds to not disclose information. Finally, provisions requiring government bodies to disclose information on their own initiative are missing.

Recently for all of these problems, solutions have been sought. To solve the first of these problems, last year a legislative act came into force that stipulates that those provisions in the GALA concerned with the forfeiting of a penalty for untimely decision-making are no longer applicable to requests on the basis of the WOB. The WOO, a bill that is aimed to replace the WOB, intends to make public and parastatal bodies more transparent in order to better serve the transparency of information that ought to be publicly accessible for citizens in any democratic state and should allow for good governance and could stimulate economic development. The future will learn whether the legal measures introduced by the WOO will sort the intended effect.

REFERENCES

- Boonstra, W. (2013, July 31). Ambtenaren maken oneigenlijk gebruik WOB, *Binnenlands Bestuur*. <http://www.binnenlandsbestuur.nl/bestuur-en-organisatie/nieuws/ambtenaren-maken-oneigenlijk-gebruik-van-wob.9076462.lynkx?pageStart9=11>
- Daalder, E. (2015). *Handboek openbaarheid van bestuur*. Den Haag: Boom Juridische uitgevers.
- Marseille, A. T., & Wever, M. (2016). Snelheid, finaliteit en winstkans in het bestuursrechtelijke hoger beroep, *Nederlands Juristenblad* 91 (13), 848.
- Van Haeften M., Wils, J., & Grimmus T. (2010). *Omvangrijke Wob-verzoeken. Aantallen, kenmerken en wijze van afhandeling*, Den Haag: ministerie van Binnenlandse Zaken en Koninkrijksrelaties.

- Van der Sluis, C. N. (2016a). De Wet open overheid in de gemeentelijke praktijk; de behandeling van het Woo-verzoek (deel I), Gemeentestem 2016/135.
- Van der Sluis, C. N. (2016b). De Wet open overheid in de gemeentelijke praktijk; besluitvorming bij passieve en actieve openbaarmaking (deel II), Gemeentestem 2016/144.